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No. 85-21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY, *et al.*,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION OF ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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January 3, 1986

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MOTION OF ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Association of American Railroads (AAR) hereby moves, pursuant to Supreme Court Rule 36.3, for leave to file the accompanying brief as *amicus curiae* in support of the respondents.[1]

The AAR is the trade association for the nation's railroads. Its members operate approximately 92% of the trackage and account for approximately 97% of the freight revenues of all railroads in the United States.

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[1] Respondents have consented to the filing of this brief; petitioners have not.

The Association represents its member railroads before courts, agencies, and the Congress in matters of common concern.

Petitioners question the continuing validity of this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), in a motor carrier case to be decided under the law as it stood prior to 1980. If this Court were to overrule that case retroactively, the decision would have a substantial and unfair impact on railroads by exposing them to possible treble damage liability for joint carrier rate-making in decades prior to 1980 as well as in the recent past. Indeed, several members of the AAR are defendants in private treble damage actions in which the validity of the *Keogh* rule before 1980 is a critical issue, some of which involve rate actions going back as far as 1956.[2] Consequently, the issue presented here of the vitality of the *Keogh* doctrine in situations arising prior to the enactment of major new regulatory legislation in 1980 continues to be significant to the railroad industry.

In addition to demonstrating the continuing need for and validity of the *Keogh* doctrine prior to the 1980 amendments to the Interstate Commerce Act, the AAR attempts to outline the 1980 rail legislation as it applies to ICC regulation of rail rates. Although we believe this is not an appropriate case in which to determine the effects on the *Keogh* doctrine of either the Motor Carrier

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[2] *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed sub nom. Little Crow Milling Co.* v. *Baltimore & Ohio RR.*, 54 U.S.L.W. 3085 (U.S., July 16, 1985) (No. 85-112); *Litton Industries, Inc.* v. *Penn Central Corp.*, No. C 81-372 (N.D. Ohio, Oct. 5, 1984) and *Pinney Dock & Transport Co.* v. *Penn Central Corp.*, 600 F. Supp. 859 (N.D. Ohio 1983), *on reconsideration*, 600 F. Supp. 866 (N.D. Ohio 1984), *appeals docketed*, Nos. 84-3654 & 84-3876 (6th Cir., Aug. 10, 1984, and Oct. 29, 1984); *In re Lower Lake Erie Iron Ore Litigation*, MDL 587, Memorandum and Pretrial Order No. 4 (E.D. Pa. June 5, 1985).

Act of 1980 or the Staggers Rail Act of 1980, those enactments are discussed in the briefs for petitioners and for the *amici* supporting petitioners, including the United States, and the legislation treats motor carriers (represented by respondents) differently from railroads.

In the accompanying brief, the AAR addresses the issues presented by the case from the railroad industry's perspective. The AAR believes that it would be useful to the Court to have the railroad industry's views on these matters, particularly since *Keogh* dealt specifically with the regulation of railroads long before motor carriers became subject to the Interstate Commerce Act.

Accordingly, we respectfully request that the Court grant the AAR leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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THE INTEREST OF AMICUS

The interest of the *amicus* is set forth in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

Petitioners and the United States seek to have this Court overrule the doctrine of *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), under which plaintiffs may not recover treble damages based on claims that published rates filed with and regulated by the Interstate Commerce Commission (ICC) would have been lower but for a violation of the antitrust laws.

A. The *Keogh* doctrine represents a carefully considered and appropriate reconciliation of the opposing policies of the Interstate Commerce Act (ICA) and the antitrust laws. By requiring persons seeking monetary damages resulting from rates filed with and regulated by the ICC to complain to that agency rather than to federal antitrust courts, *Keogh* ensured that the detailed regulatory and remedial provisions of the ICA would not be subverted.

B. Petitioners' principal argument is that Congress "supplanted" the *Keogh* doctrine by the Reed-Bulwinkle Act. Not only did Congress fail to overrule *Keogh* in that Act, as the United States concedes, but the legislative history demonstrates that Congress intended to accept and supplement—rather than nullify—the *Keogh* doctrine.

C. The Government's principal argument is that *Keogh* has been so eroded by subsequent developments in the law that overruling is necessary. But the judicial developments upon which the Government relies reflect doctrines that had already matured by 1945 when *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), expressly reaffirmed *Keogh* and, indeed, largely antedate *Keogh* itself. Under the circumstances, principles of *stare decisis* weigh heavily against overturning this sixty-year old reconciliation of significant federal statutes.

D. The *Keogh* doctrine remains a sound accommodation of antitrust and transportation policy wherever the ICC has continued power to regulate filed rates. The Government's arguments to the contrary do not adequately reflect the policies and provisions of the ICA. In particular, the flexible remedial authority of the ICC, an expert administrative agency familiar with all the interests involved, would be replaced by the rigid treble-damages remedy of the antitrust laws in litigation to be decided by courts and juries.

E. The Government also argues that recent amendments to the ICA, including the Staggers Rail Act of 1980, represent a Congressional repudiation of *Keogh*. Although the Staggers Act was a comprehensive revision of the regulatory provisions governing rail carriers, that Act did not expressly or impliedly overrule *Keogh*. Instead it established several different regulatory regimes applicable in different circumstances. While the obligation to adhere to published rates no longer applies to some rail traffic, it continues to apply to other traffic. Moreover, while the scope of ICC regulation has been loosened in varying degrees as to some traffic, that regulation continues virtually unabated as to other traffic. Thus, in many cases, the regulatory underpinnings of *Keogh* remain in full force. In any event, the Staggers Act is not involved in this case, and the impact of the new regulatory regime upon the *Keogh* doctrine should be decided in cases where such issues are directly involved and fully briefed. The Act provides no basis for reshaping pre-1980 law on the basis of the changes made in 1980.

F. Should all these arguments be rejected, any overruling of *Keogh* should be prospective only. Under the circumstances, however, there is no justification for overruling a doctrine that has been an essential component of the regime of rail rate regulation for over sixty years.

ARGUMENT

I. The *Keogh* Doctrine Was an Appropriate Judicial Accommodation Between Two Sharply Conflicting Statutory Regimes.

A. *The Antitrust Laws and the Interstate Commerce Act Embodied Opposing Approaches to the Regulation of Rates and Prices.*

The Sherman Act and the Interstate Commerce Act (ICA) embodied fundamentally conflicting approaches to prices and rates—conflicting as to objectives, standards and means.

The fundamental purpose of the Sherman Act is to protect competition. Its premise is that the public good is served best if goods and services are offered at prices and terms set by competition. The courts enforce the law through criminal sanctions, punitive treble damages, and civil injunctions. Rate regulation under the ICA, however, took a very different approach. The railroads, as common carriers, were obliged to provide service to all who requested it, 49 U.S.C. § 1(4),[1] and the ICA embodied a national transportation policy that sought, rather than competitively determined prices, "the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices." 54 Stat. 899. Accordingly, the Act required rates that were "just and reasonable," 49 U.S.C.

[1] The initial Act to Regulate Commerce was enacted in 1887. 24 Stat. 379. As amended and supplemented, it was published in 49 U.S.C. §§ 1 *et seq.* until codified by Pub. L. 95-473, 92 Stat. 1337 (1978), as 49 U.S.C. §§ 10101 *et seq.* While that codification was not intended to make any "substantive change" in the law (see § 3(a), 92 Stat. 1466), it extensively revised the structure and language of the Act. Extensive substantive changes were made by the Staggers Rail Act of 1980. Citations in this brief to 49 U.S.C. §§ 1 *et seq.* are to the relevant provisions applicable to railroads as amended through January 18, 1976, as published in 49 U.S.C. (1970 ed. & Supp. V 1975), which generally sets forth the cited provi-

§ 1(5), without "undue or unreasonable" preferences or advantages to any person, company or place, *id.* § 3(1). Those rates had to be set forth in tariffs filed with the ICC, open to public inspection, *id.* § 6(1). Carriers could not lawfully depart from those published rates, *id.* § 6(7), and could not change them without 30 days advance notice to the ICC and to the public, *id.* § 6(3). Rebates were prohibited, *id.* § 2, and made subject to criminal penalties, *id.* § 41.

A complex structure of interdependent rates emerged from these regulatory requirements. Because rates could not discriminate between shippers, ports, or places, the rate charged for moving a particular shipper's goods between two points could not be set in isolation, but had to take into account rates applicable to competing shippers, ports, and geographic areas.[2] Because rate differences could divert traffic and threaten the economic health of competing carriers, rates had to take into account rates charged by competitors.[3] Because the ICA required adequate, reasonably priced rail service for all traffic, the ICC at times required below-cost services and what in effect were cross-subsidies among shippers, and required carriers to maintain capacity beyond that which the market would justify.[4] The application of these statutory standards required an often complicated weighing and balancing of the various considerations embodied in the national transportation policy—in particular balancing the need of shippers for economical transportation against the need of railroads for revenues sufficient to support adequate and efficient service.[5]

Congress created a single agency to administer this regime. It was recognized that courts had "neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 548 (1942). To be sure, the ICC was called on to approve or disapprove only a fraction of all filed rates, but the ICA set standards for all such rates, and anyone affected by a rate could invoke an ICC investigation.

Moreover, instead of the retrospective punitive regime of the Sherman Act, the ICA remedial scheme was largely prospective and compensatory. The ICA required advance public filing of rates so that interested parties could protest any deemed to be unreasonable or discriminatory. Upon such a protest, or on its own initiative, the ICC could investigate and suspend the rates, 49 U.S.C. §§ 13(1), 15(7), prescribe different rates that would be just and reasonable, *id.* § 15(1), and grant reparations for overcharges and other violations, *id.* §§ 8, 9, 16(1). Rates had to be challenged within two years from accrual of the cause of action "and not after," *id.* 16(3)(b), because economic conditions changed and rendered the

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sions as they read during the bulk of the period at issue here. Selected provisions are in the statutory appendix attached hereto.

[2] See, *e.g.*, *Iron Ore Rate Cases*, 41 I.C.C. 181 (1916), *supplemental proceedings*, 44 I.C.C. 368 (1917); *Trunk-Line and Ex-Lake Iron Ore Rates*, 69 I.C.C. 589 (1922).

[3] Indeed, the ICC on numerous occasions expressly disapproved efforts by a carrier to charge more "competitive" rates, opting in favor of uniform rates that assured equal treatment of shippers and subsidized less economically robust carriers. See, *e.g.*, *Reduced Handling Charges on Iron Ore at Marquette, Michigan, Docks*, 315 I.C.C. 347 (1961); *Lake Coal Demurrage*, 232 I.C.C. 735, 771-774 (1939); *Trunk-Line and Ex-Lake Iron Ore Rates*, *supra*, 609-611. See also *American Commercial Lines, Inc.* v. *Louisville & Nashville R.R. Co.*, 392 U.S. 571 (1968).

[4] See, *e.g.*, *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 480 (1924); *Colorado* v. *United States*, 271 U.S. 153, 168-69 (1926); *Northwestern Pac. R. Co. Abandonment*, 320 I.C.C. 19, 24 (1963); S. Rep. No. 94-499 at 10-11 (1975).

[5] *E.g.*, *Motor Vehicles, Kansas City, Mo., to Southwest*, 332 I.C.C. 615, 624-26 (1968); *Import and Domestic Rates on Vegetable Oils*, 78 I.C.C. 421, 527-28 (1923). For detailed discussions of rate regulation, see 3B I.L. Sharfman, *The Interstate Commerce Commission* (1936); D. P. Locklin, *Economics of Transportation* (7th ed. 1972).

world of past rates obsolete and difficult to reconstruct. See *Baer Brothers* v. *Denver & Rio Grande R.R.*, 233 U.S. 479, 488 (1914); *Anadarko Cotton Oil Co.* v. *Atchison, Topeka & Santa Fe Ry.*, 20 I.C.C. 43, 50 (1910). Thus, the ICA provided shippers and others with a complete remedy administered by an agency which would take into account the policies of the Act.

Recognizing the ICC's exclusive jurisdiction with respect to rate-making, this Court from 1907 through its latest decision in 1982, in a variety of contexts, has consistently refused to permit lower courts to go behind the rates filed with the ICC, whatever the justification. To do otherwise would disrupt the administrative procedures and regulatory policies of the ICA; it would threaten the Act's precepts of nondiscrimination and rate uniformity as well as the balance between shipper and carrier interests that Congress had confided to the ICC. *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959); *Arrow Transportation Co.* v. *Southern Railway*, 372 U.S. 658 (1963); *Burlington Northern Inc.* v. *United States*, 459 U.S. 131 (1982). Thus, *Keogh* was simply one of an unbroken line of decisions, albeit an important one, aimed at preserving the pre-eminence of the ICC in rate-making matters.

B. *The* Keogh *Doctrine Represented a Judicial Accommodation Tailored to the Direct Conflict Between Treble Damage Remedies and the ICC's Rate Authority Under the Interstate Commerce Act.*

The regulatory regime embodied in the ICA thus required carriers in setting their rates to look to legal standards very different from those under the antitrust laws. In similar situations, antitrust actions have been completely barred by this Court because they would "pose[] a substantial danger that [the defendants] would be subjected to duplicative and inconsistent standards." *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694, 735 (1975); *Gordon* v. *New York Stock Exchange*,

Inc., 422 U.S. 659, 688-89 (1975); *cf. Southern Motor Carriers Rate Conf.* v. *United States*, 53 U.S.L.W. 4422 (U.S., March 27, 1985).[6]

In contrast to those cases, the Court in *Keogh* took a more limited approach. In closely divided decisions, the Court had previously rejected wholesale immunity from the antitrust laws for collective rate-making by common carriers. *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897); *United States* v. *Joint Traffic Association*, 171 U.S. 505 (1898). As *Keogh* itself recognized, "a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6." 260 U.S. 161-62. But the Court in *Keogh* nevertheless precluded private treble damage actions—a remedy that presented a direct conflict with the rate provisions of the ICA.

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[6] *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966), is not to the contrary. The Court there rejected a contention that the Shipping Act impliedly "precludes the application of the antitrust laws to the shipping industry" (383 U.S. at 215), but as Judge Friendly pointed out, the Shipping Act was "a very limited regulatory scheme" as compared to the ICA so that, among other things, "the filing of tariffs under the Shipping Act [did] not limit the rights of shipper vis-a-vis carrier" (Pet. App. 32a). Thus, *Carnation* would not be inconsistent with an implication of complete antitrust immunity for carriers regulated under the ICA, much less the more limited exclusion of an antitrust damages remedy under the *Keogh* doctrine.

We note that *United States* v. *National Ass'n of Securities Dealers, supra*, involved a statutory requirement of adherence to a published price in a manner analogous to the provisions of the ICA relied on in *Keogh*. See 422 U.S. at 699, 711. The Court pointed out that "in view of this express requirement no question exists that antitrust immunity must be afforded" sales to which that statutory requirement applied. *Id.* 699.

1. *Treble Damage Actions Directly Conflicted with the Regulatory Regime.*

To be entitled to treble damages under the antitrust laws for rates charged by an allegedly unlawful combination of carriers, the plaintiff would have to establish that, in the absence of the antitrust violation, a different—and lower—rate would have been charged. Damages would be based on the difference between that rate and the rate actually charged.

Such claims presented a direct conflict with the provisions of the ICA in three respects. First, under the ICA the carrier could lawfully charge only the tariff rate, 49 U.S.C. § 6(7); failure to charge it was a criminal offense, *id.* § 41. Second, plaintiffs had to establish not only that a lower rate would have been charged in the absence of the antitrust violation, but that such rate would have been "reasonable" and "nondiscriminatory" under the substantive standards of the ICA—a determination that only the ICC could make. Third, the ICA established an ICC-administered remedial scheme very different from the remedial scheme under the antitrust laws, which offered treble damages imposed by a jury able to look far backward in time—a remedy that could undermine the financial health of carriers, which the ICC was required to foster.

2. *The* Keogh *Decision Represented a Sound Response to the Conflict Posed by Treble Damage Actions.*

The Court considered each of these problems in *Keogh*. The Court held that, because the challenged rates were contained in published tariffs duly filed with the ICC, they could not be the basis of an award of antitrust damages. 260 U.S. at 160, 162. The Court emphasized that the lawfulness of railroad rates is to be determined under the provisions of the ICA, not the antitrust laws: "A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the

Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce." *Id.* 162. Reasoning that injury implied violation of a legal right and finding that plaintiff's rights were "measured by the published tariff," the Court held that the plaintiff suffered no injury cognizable under the antitrust laws, as a result of the alleged conspiracy. *Id.* 163. The Court further justified its holding on the ground that if a plaintiff recovered antitrust damages for injuries from allegedly excessive rate levels, it would obtain a preference over its trade competitors, thus defeating the "paramount purpose" of Congress—prevention of unjust discrimination. *Id.*

A second basis for the *Keogh* decision was that a plaintiff, to recover damages, had to establish that "the hypothetical lower rate would have conformed to the requirements of the [ICA]"—no simple matter since, for example, "it is possible that no lower rate from St. Paul on tow and excelsior could have been legally maintained without reconstituting the whole rate structure for many articles moving in an important section of the country." 260 U.S. at 164. Such determinations must be made by the ICC, at least in the first instance, not by courts and juries. *Id.*

Finally, the Court concluded that, in view of the remedial provisions of the ICA, Congress could not have intended to provide shippers with the quite different and essentially conflicting damage remedy provided by the antitrust laws, noting that the ICC had plenary power to grant the full amount of damages sustained by a shipper because of any unlawful rate. 260 U.S. at 162, citing §§ 8, 9, and 16 of the ICA.[7]

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[7] The Court further elaborated the basis for this holding in *Terminal Warehouse* v. *Penn R. Co.*, 297 U.S. 500 (1936), as follows:

> "The Commerce Act * * * embodies a remedial system that is complete and self-contained. It provides the means for ascertaining the existence of a [violation of the Act] but it does not stop at that point. * * * For the wrongs that it denounces

3. *The* Georgia *Decision Expressly Reaffirmed the Accommodation Reached in* Keogh.

Twenty-three years later, the accommodation reached in *Keogh* was revisited and reaffirmed in *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). The Court granted the State of Georgia leave to file an antitrust complaint for damages and injunctive relief against twenty railroads, alleging a conspiracy to set, through some sixty rate bureaus, "noncompetitive rates and charges for transportation of freight by railroad to and from Georgia so as to prefer the ports of other States over the ports of Georgia," 324 U.S. at 443. Georgia sued both as *parens patriae* and as a proprietor of a state-owned railroad and thus as a competitor of the defendant railroads.[8] *Id.* The rates had been filed but, unlike the rates in *Keogh*, had not been challenged before the ICC. *Id.* 453, 476. Nevertheless, in discussing whether the complaint stated a cause of action, the Court held squarely:

> "We think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist. * * * The reasoning and precedent of that case apply with full force here." *Id.* 453.[9]

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it prescribes a fitting remedy which, we think, was meant to be exclusive." 297 U.S. at 514.

[8] The Brief of C.D. Ambrosia Trucking Co. *et al.* as *Amicus Curiae* (at 5) urges this Court, if it affirms *Keogh*, to hold that *Keogh* does not bar suits by competitors. That issue, which is involved in certain cases now in the lower courts, is not before the Court in this case and therefore is not an appropriate one to address, except to note that sustaining the contention of those *amici* would require a holding that *Georgia* was erroneously decided as to the State's claims as a proprietor. With respect to the assertions in that brief (at 11-20) about the conduct of certain railroads at issue in the Lake Erie iron ore litigation, none of these cases has come to trial and many of those assertions are contested. See accompanying Motion at 2, n.2.

[9] Chief Justice Stone and the three other dissenters fully concurred in this conclusion, as to which the Court was therefore unanimous. 324 U.S. at 468.

The Court held that, since the ICA did not give the ICC any jurisdiction over the alleged rate-fixing conspiracy insofar as it involved coercion (*id.* 455-63), the exclusive jurisdiction doctrine could not bar an injunction to put an end to such activities; such an injunction "need not enjoin operation under established rates." *Id.* 455. But since the ICC did have jurisdiction over the rates and charges themselves, that jurisdiction excluded any remedy under the antitrust laws based on the rates imposed. *Id.* 454. The Court explicitly adopted the reasoning of *Keogh*, relying heavily on the view that the tariff rate was the only "legal" rate "until suspended or set aside" by the ICC. *Id.* 453. Accordingly, the Court held that Georgia could not, in its antitrust conspiracy action, recover damages based upon the rates imposed pursuant to the alleged conspiracy, *id.*, nor could it obtain injunctive relief setting those rates aside, *id.* 454-55.

II. The Congress Accepted the *Keogh* Doctrine When It Enacted the Reed-Bulwinkle Act.

Contrary to the principal arguments advanced by petitioners (Br. 16-29), we agree with Judge Friendly that, as the Government concedes, "Congress did not overrule *Keogh* in passing the Reed-Bulwinkle Act" (U.S. Br. 16). Petitioners are nevertheless correct in focusing upon Reed-Bulwinkle and its legislative history as a leading indication of the intent of the Congress in regard to the propriety of the *Keogh* doctrine. The enactment of Reed-Bulwinkle was the occasion on which the Congress most explicitly, and exclusively, considered the relationship between the ICA and the antitrust laws. Moreover, that was done in the context of and in reaction to the *Georgia* decision as well as to certain civil injunctive and criminal actions brought by the Department of Justice.[10]

Those "developments [had] caused grave concern among all those having direct interest in transportation, who see

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[10] See H.R. Rep. No. 1100, 80th Cong., 1st Sess. 4-5 (1947); S. Rep. No. 44, 80th Cong., 1st Sess. 5-6 (1947).

in the situation a threat to long-standing practices in the transportation industry that were developed in cooperation with the shippers and have proved their worth;" which "concern [was] evidenced by the views expressed during the hearings by the shipping and business interests of the country, and by governmental authorities," who "were virtually unanimous in their demand for remedial legislation." S. Rep. No. 44, *supra*, at 6; accord, H.R. Rep. No. 1100, *supra*, at 4.[11] The "remedial legislation" thus demanded and enacted was directed solely at that aspect of *Georgia* which upheld the jurisdiction of the courts to enjoin the alleged conspiracy insofar as it involved activities over which the ICC did not have jurisdiction. Reed-Bulwinkle added a new § 5a to the ICA (49 U.S.C. § 5b) which authorized the ICC to approve agreements establishing rate bureaus for the joint consideration of rates and charges, and relieved both the making and the carrying out of such agreements in accordance with their terms and conditions "from the operation of the antitrust laws." 62 Stat. 472.[12]

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[11] The Chairman of the House Interstate and Foreign Commerce Committee inserted in the Hearings on H.R. 221 and S. 110, 80th Cong., 1st Sess. (1947) ("1947 House Hearings"), at 286-301, a 15-page listing by name of "organizations supporting S. 110, as shown by the record of hearings on H.R. 2536, Seventy-ninth Congress, and S. 110, Eightieth Congress" (*id.* at 286). See also, generally, Hearings on H.R. 2536 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 79th Cong., 1st Sess. (1945) ("1945 House Hearings"); Hearings on H.R. 2536 Before the Senate Comm. on Interstate Commerce, 79th Cong., 2d Sess. (1946) ("1946 Senate Hearings"); Hearings on S. 110 Before the Senate Comm. on Interstate and Foreign Commerce, 80th Cong., 1st Sess. (1947) ("1947 Senate Hearings").

[12] Among other things, the committee reports pointed out that the ICA imposes duties and responsibilities upon carriers, as with respect to joint rates and through routes, "which by their very nature can be met only through joint action on the part of the carriers"; that the need for joint action is not limited to joint rates or to the participants in such rates because the "rates which together make up a rate structure necessary to satisfy both the standards prescribed by law and the legitimate requirements of commerce are

The Reed-Bulwinkle Act did not nullify the *Keogh* doctrine, or that aspect of the *Georgia* decision applying *Keogh*, either expressly or by repeal of the statutory basis for the doctrine in the ICA:

> "The bill provides for no relief from any provision of law other than the antitrust laws. *Notwithstanding the approval of an agreement by the Commission, all provisions of the Interstate Commerce Act will apply to the carriers and to action taken by them to the same extent and in the same manner as though such agreement had not been approved.*" H.R. Rep. No. 1100, *supra*, at 5; S. Rep. No. 44, *supra*, at 8 (emphasis added).

Hence, the "bill leaves the antitrust laws to apply with full force and effect to carriers, *so far as they are now applicable*," except for the antitrust immunity provided therein for agreements approved by the ICC. H.R. Rep. No. 1100, *supra*, at 5; S. Rep. No. 44, *supra*, at 7-8 (emphasis added).

If the ICA is applied "to the same extent and in the same manner as though [a rate-bureau] agreement had not been approved" under the Reed-Bulwinkle amendment, plainly that Act must be applied so as to preclude recovery of antitrust damages based upon tariff rates filed with and regulated by the ICC. The *Keogh* decision was grounded upon an interpretation and application of provisions of the ICA that continued in effect at the time of Reed-Bulwinkle and thereafter. Thus, in stating

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interrelated and interdependent"; that the "law places upon the carriers the duty to initiate rates which meet the same standards that are applied by the Commission in reaching its determinations as to their lawfulness," and the rate bureaus provide "a method by which rates, in advance of their publication, are subjected to tests as to their reasonableness and lawfulness in other respects similar to those which are commonly applied" by the ICC, including consultation with shippers as to "their wishes and needs"; and "that as a result of the application of that method the volume of rate litigation before the regulatory bodies is greatly reduced." H.R. Rep. No. 1100, *supra*, at 8-10; S. Rep. No. 44, *supra*, at 9-11.

that the antitrust laws would continue to apply to carriers "so far as they are now applicable" except insofar as made inapplicable by Reed-Bulwinkle, the congressional committees must have understood and intended that the *Keogh* doctrine would continue to apply after the enactment of Reed-Bulwinkle. This is particularly so since those committees were aware both of the *Georgia* decision reaffirming and applying the *Keogh* doctrine and of the *Keogh* decision itself.[13]

In addition to innumerable references to the *Georgia* decision during the congressional hearings, the entire *Georgia* opinion (including the dissent) was included in the record of the 1946 Senate Hearings (at 1529-48). There were also a number of references to the *Keogh* decision itself. During the 1946 Senate Hearings, for example, Clyde B. Aitchison, then a Commissioner of the ICC who had "been instructed by the Commission to present its views on the pending bill" (*id.* at 1131), testified, among other things, that:

> "Thus, in *Keogh* v. *Chicago & N.W. Ry. Co.* (260 U.S. 156)—which involved a regulated common carrier—the Court passed on the liability under section 7 of the Sherman Act of a railroad to a shipper for rates charged according to tariffs which were in conformity with the Commerce Act. The Court remitted the shipper to the Interstate Commerce Commission for any damages he might have suffered from illegal (unreasonable or discriminatory) rates, despite there might have been an antecedent illegal combination

[13] In that regard, the Senate Committee noted generally "that in the field of transportation important objectives of the antitrust laws are achieved by means of Government regulation. For example, the antitrust laws are designed to protect the public from unreasonable and excessive prices or unduly limiting production. But resort to such laws is not necessary for that purpose in the case of common carriers because the objective of reasonable prices is achieved by other means, that is, by clothing governmental authorities with power to fix reasonable rates and charges." S. Rep. No. 44, *supra*, at 4.

> of carriers, for which the Government might have criminal redress under section 3, and injunction under section 4, and forfeiture under section 6 of the Sherman Act * * *.
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> "* * * But anyway, the net result of the Keogh decision was to limit the force of section 7 of the Sherman Act, as related to wrongs for which there was a money-damage remedy afforded under the Interstate Commerce Act."

1946 Senate Hearings at 1148. Commissioner Aitchison also referred to *Keogh* as an attempt by Justice Brandeis "to reconcile the antitrust laws with the Commerce Act" (*id.* at 1161), and noted that the *Georgia* decision was so "fresh in the minds of the committee" that he did "not feel it is necessary" to do more than advert to the fact of that decision (*id.* at 1148).[14]

No witness in the Reed-Bulwinkle hearings and no member of Congress urged that the *Keogh* doctrine, either as established in *Keogh* or as applied in *Georgia* (or else-

[14] Arne C. Wiprud also cited *Keogh* and quoted a portion of the *Georgia* opinion which pointed out that *Keogh* "held that damages could not be recovered," while stating "that a conspiracy to fix rates would be illegal even though the rates fixed were reasonable and nondiscriminatory." 1946 Senate Hearings at 581. Mr. Wiprud, then in private practice, had in 1941-45 headed the Transportation Section, Antitrust Division, Department of Justice. 1946 Senate Hearings at 553; 1947 House Hearings at 229. He also quoted references in the *Georgia* opinion to *Keogh* in the 1946 Senate Hearings at 571-572, cited *Keogh* directly in the 1947 House Hearings at 244 for the proposition that the Government could enjoin joint rate-fixing as a violation of the Sherman Act "but a private individual had recourse to the Interstate Commerce Commission," and noted (*id.* at 245) that "the Keogh case has been repeatedly cited with approval by the Supreme Court." See also *id.* at 272. *Keogh* also was cited and quoted by Wendell Berge, 1946 Senate Hearings at 799, 1947 Senate Hearings at 73-74, and 1947 House Hearings at 191, who was then Assistant Attorney General in charge of the Antitrust Division (1946 Senate Hearings at 739 and 1947 Senate Hearings at 57); and by William L. McGovern, 1946 Senate Hearings at 1456, Deputy Assistant Attorney General of Georgia (*id.* 1455).

where), was no longer good law, or should not be the law, or constituted an improper or undesirable accommodation of the ICA and the antitrust laws, or otherwise had been or should be nullified by the Congress or by the courts.[15] Even the opponents of the bill did not criticize the *Keogh* doctrine or suggest that it be limited or nullified in any way.[16] Rather, they contended that this Court's decisions up to and including *Georgia* had appropriately accommodated the ICA and the antitrust laws so that there was no need for the extension of ICC jurisdiction to cover rate-making agreements, with a concomitant exemption from the antitrust laws, as proposed in the bill. Assistant Attorney General Berge testified, for example, that there was no "confusion" as to the application of the antitrust laws "to the railroads" as "there are long lines of judicial decisions that mark them out," culminating in the *Georgia* decision, which case when finally decided would further make a pronouncement "as to what that permissible field of collaboration is" (1946

[15] None of the legislative history of Reed-Bulwinkle relied upon by petitioners (Br. at 21-26) is to the contrary, as seems apparent from the excerpts quoted by petitioners and is even clearer in context. For example, Mr. Sam Winn, who is quoted by petitioners (Br. at 28) to the effect that, under the bill, rate-making agreements would be relieved from the operation of the antitrust laws only to the extent that they are approved by the ICC, also pointed out that the antitrust laws, upon "passage of the bill, * * * will continue to apply, *insofar as they are now applicable,*" except for the additional antitrust immunity provided therein for approved agreements. 1946 Senate Hearings at 367 (emphasis added). See generally *id.* 365-370.

[16] The principal opponents were the Department of Justice, with testimony or submissions by Attorney General Tom C. Clark, Assistant Attorney General Berge, and Special Assistants James E. Kilday and Albert Boggess (1945 House Hearings at 3-5, 1946 Senate Hearings at 739-1108, 1462-1529, 1947 Senate Hearings at 57-81, and 1947 House Hearings at 156-217); the State of Georgia, by Governor Arnall and Mr. McGovern (1946 Senate Hearings at 417-551, 1455-62, 1945 House Hearings at 379-81); and Arne Wiprud (1946 Senate Hearings at 553-630, 1947 Senate Hearings at 118-23, and 1947 House Hearings at 229-83).

Senate Hearings at 742); that the "Congress has already made the policy and there is nothing wrong with it and there isn't any occasion to change it; that the only occasion for change would be if the policy of Congress were misinterpreted by the courts or if the detailed application of the policy as it is made in court decisions were unsatisfactory to Congress" (*id.* at 781-82); and that he didn't "see how Congress can conclude that the policy which it has had in effect for half a century should be changed until there is a final court decision" in the *Georgia* case (*id.* at 822).

The committee reports also point out that the public interest would not be left unprotected:

> "While the approval of the basic agreement * * * operates to remove from the application of the antitrust laws any action taken thereunder * * *, it should be noted that the application of * * * the Interstate Commerce Act * * * is unaffected by the granting of relief from the antitrust laws. Any person dissatisfied with any such action has the right to complain thereof to the Commission * * *."

S. Rep. No. 44, *supra*, at 14, generally, at 13-14; *accord*, H.R. Rep. No. 1100, *supra*, at 11-12. In addition, § 5a(7) of the Reed-Bulwinkle amendment authorized the ICC "upon complaint or upon its own initiative" to investigate a previously-approved agreement and to "terminate or modify its approval" if necessary. That provision was intended to assure that the "public interest * * * will be adequately protected" by enabling the ICC "to correct situations which may develop through the operation of agreements in ways which were not foreseen at the time of the original grant of approval." H.R. Rep. No. 1100, *supra*, at 16. "The fact that questions of this character will be confined to the Commission for decision will result in a uniformity in the administration of the law which can only come by vesting control in a single body. In view of the national scope of the transportation system

diversity of decision must be avoided because of the chaos it would create." S. Rep. No. 44, *supra*, at 15-16.

As Judge Friendly concluded, the legislative history of Reed-Bulwinkle "refutes the contention that Congress intended to overrule the *Keogh* doctrine in enacting the legislation." Pet. App. 20a. Rather, as we have shown, Congress, with full knowledge of the *Keogh* doctrine as reaffirmed and applied in *Georgia*, accepted that doctrine while providing additional antitrust immunity for rate bureaus that had been found to be lacking in *Georgia*.[17]

III. There Have Been No Judicial Developments That Would Justify Overruling the Long-Established *Keogh* Doctrine.

The Government's principal argument appears to be that *Keogh* has been so eroded by subsequent developments in the law that it now should be overruled (see U.S. Br. 7-21). But the law was not in such a primitive state as the Government claims when *Keogh* was decided, and the "developments" upon which the Government relies reflect doctrines that had matured when *Georgia* reaffirmed and applied the *Keogh* doctrine—as, indeed, is demonstrated by the Government's own citations.[18] More-

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[17] The fact that the Congress in Reed-Bulwinkle provided an express antitrust immunity in the circumstances there specified is not inconsistent with an implied immunity resulting from other provisions of the ICA, much less with *Keogh*'s preclusion of antitrust damages. Indeed, when *Keogh* was decided, § 5 of the ICA as enacted by the Transportation Act of 1920 (41 Stat. 480-482) provided express antitrust immunity for pooling agreements, mergers and consolidations approved by the ICC, and that continued to be true (as amended and expanded by the Transportation Act of 1940, 54 Stat. 905-10) when *Georgia* was decided. See also, *e.g.*, *Pan American World Airways* v. *United States*, 371 U.S. 296 (1963); *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687, 691 (9th Cir. 1977), *rev'd on other grounds*, 437 U.S. 322 (1978).

[18] Perhaps this is why the reaffirmation of *Keogh* in *Georgia* virtually has been ignored by the Government, *e.g.*, U.S. Br. 8 n.8.

over, the principles of *stare decisis* weigh heavily against overruling a doctrine that has been established and followed for more than 60 years even if some of its underlying bases have been eroded.

United States v. *Borden Co.*, 308 U.S. 188 (1939), is among the cases cited by the Government for the proposition that the availability of an administrative remedy does not necessarily evidence an intent to deny relief under the antitrust laws—regulated industries are not *per se* exempt from the antitrust laws (see U.S. Br. 8-11). But *Borden* was referred to in the *Georgia* opinion for the same proposition (324 U.S. at 456).

Class actions under Fed. R. Civ. P. 23 (U.S. Br. 12) also preceded *Georgia*, having been available since those Rules became effective in 1938.

The possibility of a reference to the ICC under the primary jurisdiction doctrine (see U.S. Br. 12-13) was considered and rejected in *Keogh* itself (260 U.S. at 164). Moreover, the cases relied upon by the Government in that connection include *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940) (U.S. Br. 13 n.17), and *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M.C.C. 337 (1944) (U.S. Br. 13 & 14 n.18), both decided prior to *Georgia*.

While this Court did not definitely reject the "pass-on" theory until 1968, that theory had been rejected in a railroad-rate context even prior to the *Keogh* decision, in *Southern Pacific* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), and the reference to that theory in *Keogh* was a *dictum*, as this Court noted in rejecting the "pass-on" theory. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 n.8 (1968). See U.S. Br. 14. Moreover, the leading case cited by the Government for present-day principles regarding the proof of antitrust damages is *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) (U.S. Br. 14-15), decided some 14 years before *Georgia*.

The presumption against implied antitrust immunity relied on by the Government (U.S. Br. 15-16) was involved in *United States* v. *Borden, supra,* which is cited by the Government (*id.* 16). *Borden* was cited in *Georgia* for the identical proposition that "[o]nly a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy." 324 U.S. at 457.

The proposition that there is a "zone of reasonableness" under the ICA so that more than one level of rates may be reasonable, and the related proposition that carriers generally retain the initiative in ratemaking (U.S. Br. 17-19), both antedate and are referred to in *Georgia.* Thus *Georgia* noted that the "Act was designed to preserve private initiative in rate-making," 324 U.S. at 459, citing *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.,* 284 U.S. 370 (1932), and quoted the very case relied upon by the Government—*United States* v. *Chicago, M., St. P. & Pac. R.R.,* 294 U.S. 499 (1935) (U.S. Br. 18)—for the "zone of reasonableness," 324 U.S. at 460-461.

In short, the judicial developments which the Government contends have so eroded the *Keogh* doctrine as to justify overruling what has been established and followed for more than 60 years are at most further applications and refinements of principles that were well established when *Georgia* held that the "reasoning and precedent" of *Keogh* "apply with full force here" so as to bar the recovery of antitrust damages based upon rates filed with the ICC. 324 U.S. at 453. Moreover, a reading of these cases demonstrates that in general they relied upon already-established doctrines antedating *Keogh* rather than enunciating new departures in the law.[19] Hence,

[19] *Borden* (308 U.S. at 198-199), *General American Tank Car Corp.* (308 U.S. at 432-433), and *Arizona Grocery Co.* (284 U.S. at 384), each relied for the propositions relevant here on a prior decision or decisions by this Court that antedated *Keogh. Chicago, M., St. P. & Pac. R.R.* (294 U.S. at 506) cited *United States* v. *Illinois Cent. R. Co.,* 263 U.S. 515, 524 (1924), a Brandeis opinion that in turn cited the pre-*Keogh* Brandeis opinion in *American Express Co.* v. *Caldwell,* 244 U.S. 617, 624 (1917), for the "zone of reasonableness." *Story Parchment Co.* (282 U.S. at 565-566) cited *Straus* v. *Victor Talking Machine Co.,* 297 Fed. 791, 802 (2d Cir. 1924), and "[n]umerous decisions * * * there cited * * *," which include *Hetzel* v. *Baltimore & Ohio Railroad,* 169 U.S. 26, 37-39 (1898), with respect to the principles governing proof of damages. Class actions also antedated *Keogh. Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921).

there have been no subsequent judicial developments that would justify overruling the *Keogh* doctrine as confirmed and applied in *Georgia* even apart from the weighty considerations underlying the doctrine of *stare decisis.*

Even if the bases for the *Keogh* doctrine had been eroded, more than "a half century of unwavering precedent weighs heavily against any suggestion that [the Court] now discard the settled" *Keogh* doctrine. *Miller* v. *Fenton,* 54 U.S.L.W. 4022, 4025 (U.S., Dec. 3, 1985). As the Court there noted, "'[v]ery weighty considerations underlie the principle that courts should not lightly overrule past decisions.'" *Id.,* quoting *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375, 403 (1970).

Where Congress has acquiesced in a long-standing ruling interpreting a federal statute, this Court's settled practice is to adhere to past decisions and leave any modification to Congress. *E.g., Southern Motor Carriers Rate Conf.* v. *United States,* 53 U.S.L.W. 4422, 4424 n.18 (U.S., Mar. 27, 1985) (declining to overturn the state-action doctrine "after over 40 years of congressional acquiescence"); *Flood* v. *Kuhn,* 407 U.S. 258, 282 (1972). That policy counsels heavily in favor of rejecting any effort to revise, at this late date, an important and long-established principle of transportation law.

IV. The Government's Policy Objections to the *Keogh* Doctrine Are Unsound.

The Government argues that *Keogh* should be overruled here either because there is no conflict between the treble damage remedy and the ICC's rate authority (U.S. Br.

15-21) or, if there is such a conflict, because *Keogh* no longer represents a good accommodation of that conflict (*id.* 21-27). As we show elsewhere, the conflict perceived by the Court in *Keogh* was real; continued to be real throughout the period at issue in this case; and continues to be real where Congress has retained the ICC's rate authority. We demonstrate here that the Government's objections to *Keogh*'s accommodation of antitrust and transportation policy are unsound wherever the ICC continues to regulate filed rates. In such areas, maintaining a uniform system of rate regulation administered by a single agency, as Congress prescribed, warrants foregoing any inducements to private antitrust enforcement that may have been lost by limiting plaintiffs to damages under the ICA.

The Government contends that "damage actions would further the fundamental national policies underlying the antitrust laws" (U.S. Br. 6) and that allowing shippers to maintain such actions "would provide an effective incentive for carriers to comply with their ICC-approved agreements and thus would materially further the purposes of the Interstate Commerce Act" (*id.* 22). The Government acknowledges that this Court has already approved an ICC remedy which "encourages 'carriers to limit their collective activities to the areas that Congress described in the statutory guidelines'." U.S. Br. 22-23, citing *ICC* v. *American Trucking Ass'ns, Inc.*, 52 U.S.L.W. 4709, 4713 (June 5, 1984). It does not explain why damages under that remedy, which could exceed treble damages, *id.*, are an inadequate incentive for carriers to comply with approved rate-bureau agreements and the purposes of the ICA. Nor does the Government explain how this position is consistent with the express recognition by this Court that Congress intended the ICC to play the key role in holding carriers to the statutory provisions dealing with rate-bureau agreements. *Id.*[20]

[20] "[T]he procedures governing the administration of § 14 [of the Motor Carrier Act of 1980, amending the successor to the Reed-Bulwinkle provision] demonstrate that Congress envisioned that the Commission—and not the threat of antitrust liability—would be the primary enforcer of the guidelines. It is, after all, the Commission that decides which bureau agreements conform to the dictates of § 14. 49 U.S.C. § 10706(b)(2). It is the Commission that is empowered to terminate or suspend rate-bureau agreements. § 10706(f), (h). And, it is the Commission that may impose conditions on rate-bureau agreements in order to further National Transportation Policy. § 10706(b)(2)." *ICC* v. *American Trucking Ass'ns, Inc.*, 52 U.S.L.W. at 4713. See also *id.* n.9 & pp. 17-18 *supra*.

In fact, the Government's incentive argument misses the point—criminal liability, civil injunctions, and ICC remedies which may exceed treble damages are surely adequate incentives to comply with the law. The important point is that *Keogh* preserves the discretionary authority of the ICC to accommodate the policies of the ICA in administering damage remedies.[21] For example, in another case now before this Court,[22] the ICC had taken into account the technical nature of a violation of a required rate-bureau procedure and equitable considerations that "we cannot ignore" under the policies of the ICA in refusing to award reparations to shippers, although cancelling prospectively the tariff involved. *Transit on Wheat Between Reshipping Point and Destination*, 365 I.C.C. 890, 898-901 (1982). *Keogh* protects the ICC's authority to balance the interests involved in such cases, and it was on that basis that the Seventh Circuit dismissed the shippers' subsequent treble damage action. 759 F.2d at 1309-1316. The Government and petitioners offer no sound reason for abandoning a flexible remedial process under which an expert administrative agency has discretion to accommodate relevant policies

[21] Whether a violation of rate-bureau procedures is "knowing" has no bearing on the continuing validity of *Keogh's* accommodation policy. *Keogh* has always applied to knowing violations, and the ICC has the discretion to take account of the nature of a carrier's action when it administers remedies under the ICA.

[22] *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed sub nom. Little Crow Milling Co.* v. *Baltimore & Ohio Railroad*, 54 U.S.L.W. 3085 (U.S., July 16, 1985) (No. 85-112).

for the rigid application of treble damage remedies by antitrust courts and juries.[23]

The Government contends that the ICC's exclusive jurisdiction to apply the substantive standards of the ICA is not implicated because of the "zone of reasonableness" applicable to common carrier rates under the Act. U.S. Br. 17-18. But even conceding that the "reasonableness" of a rate contained in a filed tariff does not establish that a lower rate is necessarily "unreasonable," whether a rate is within the zone of reasonableness is for the ICC. Further, even if "reasonable," there remains the issue of whether it is "discriminatory"—again, something only the ICC can decide.[24]

The Government suggests that referral to the ICC of matters falling within its jurisdiction, including the validity under the ICA of the "hypothetical rate" upon which antitrust damages would be calculated, would avoid the problems that gave rise to *Keogh*. U.S. Br. 19-20, nn. 25 & 26. But that is simply not the case. Even assuming the ICC could overcome the difficulties of determining the

[23] When faced with the problem, Congress has recognized clearly the need for the ICC to accommodate transportation and antitrust policy, as the history of Reed-Bulwinkle shows. "It is obvious that confusion and uncertainty are inevitable where these two principles of public policy, administered and enforced by different agencies, are applied in such a way that there is conflict between them." H.R. Rep. No. 1100, *supra*, at 5; S. Rep. No. 44, *supra*, at 7. The Congress concluded that the "only practical approach" is to entrust that task "to a competent administrative agency," and determined that, since "this problem arises in the relatively circumscribed field of transportation, the agency which is peculiarly well qualified to exercise this authority is the [ICC]." *Id.*

[24] Petitioners (Br. 34-35) and the Government (U.S. Br. 12-13) contend that the availability of class actions obviates any concern that antitrust damage actions might advantage some shippers over others in a manner inconsistent with the ICA. But the parties in the certified class may not include all of the parties who may claim protection against discrimination under the ICA. Since the antidiscrimination provisions of the ICA give shippers and others adverse, not common interests, Rule 23 cannot solve the problem identified in *Keogh*.

lawfulness of rates that could conceivably have been changed every few months over the 16-year period in this case from 1966 to 1981, that would not solve the problem. The rates were the only lawful rates under the law; the ICC is without authority now to suspend or set them aside retroactively to the 1966 to 1981 period, 49 U.S.C. § 11706(c)(2); and antitrust damages awarded by court or jury would be substituted for the flexible remedies administered by the ICC.

The soundness of the accommodation reached in *Keogh* is thus shown by the cases now before this Court. Plaintiffs could have challenged the rates contained in respondents' tariffs before the ICC; such a challenge could have won damages for any injury suffered within two years of the challenge and would have allowed the ICC to adjust the overall rate structure of which those rates were a part.[25] Having failed to invoke the regulatory regime intended by Congress to deal with rate issues, petitioners should not now be allowed to use an antitrust action to rewrite rate history over a 16-year period.

V. Recent Rail Legislation Offers No Basis for Arguing That *Keogh* Has Been Repudiated, Although Some Rail Traffic Is No Longer Regulated So As To Be Protected by *Keogh*.

Since 1948, the ICA has been amended several times, but the regulatory regime remained essentially unchanged until the Motor Carrier Act of 1980, 94 Stat. 793, and the Staggers Rail Act of 1980, 94 Stat. 1895. The effect of the changes made by those statutes on *Keogh* is not

[25] Contrary to the contention of petitioners (Br. 11-15) and the Government (U.S. Br. 19-20), the ICA system did not depend on any review of tariff filings by the ICC on its own initiative. It was the power of shippers and others to invoke the ICC's jurisdiction that was critical. In the hearings on the Reed-Bulwinkle Act, the Department of Justice asserted that even then only about one percent of the rates filed with the ICC were reviewed by that agency and that it would be impossible to review all of them. See, *e.g.*, 1946 Senate Hearings at 795, 804, 814 (Assistant Attorney General Berge).

before this Court. The Staggers Act is not here, of course, since this case involves motor carriers. As to the 1980 Motor Carrier Act, petitioners are seeking damages for conduct that began in 1966 and ended in 1981, just after the effective date of that Act. The Second Circuit stated that "appellants have not asked us to treat their claims arising after October 1, 1980 differently from those arising before that date * * *," Pet. App. 17a, and petitioners have not contested that assertion here. Thus none of the 1980 legislation has any application to this case.

Nevertheless, the Government contends that the continuation of the *Keogh* bar to treble damage actions is inconsistent with the heightened emphasis on competition contained in that legislation, particularly the Staggers Act. U.S. Br. 23-25. We have left to the parties any description of the 1980 Motor Carrier Act, but the Government is certainly incorrect in suggesting that the Staggers Act indicates Congressional repudiation of *Keogh*. While some rail traffic has been essentially deregulated, other rail traffic remains subject to ICC rate regulation. In the case of such regulated rail traffic, the rationale for maintaining the *Keogh* doctrine remains valid.

The purpose of the Staggers Act was "to provide, through financial assistance and freedom from unnecessary regulation, the opportunity for railroads to obtain adequate earnings to restore, maintain and improve their physical facilities while achieving the financial stability of the National rail system." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess., at 80 (1980).[26] The means Congress

[26] As the committee reports make clear, even though the ICA had been intended to ensure a healthy rail industry, the results had been far different. See, *e.g.*, S. Rep. No. 96-470, at 2-6 (1979); H.R. Rep. No. 96-1035, at 34-35 (1980). In response to such concerns, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31, but by 1980 it was generally recognized that the limited measures of that legislation had "not achieved their intended results." S. Rep. No. 96-470 at 5 (1980).

chose to pursue this goal was not a wholesale deregulation of the rail industry with unqualified application of the antitrust laws. Instead, Congress sought to eliminate unnecessary and burdensome regulation, so as to assure rail carriers the opportunity to earn adequate revenues, while preserving those aspects of regulation—including ICC oversight of rates—that were deemed to be needed to protect the interests of shippers.

In two areas the Staggers Act substantially changed the pre-existing regime of regulated tariff rates.[27] The normal provisions on tariff filing and rate regulation are lifted, first, where railroads and shippers enter into contracts governing rates and other terms of service,[28] and, second, where the ICC exempts a carrier, transaction, or category of rail service from the usual statutory requirements.[29] But while the contract and exemption provisions are undeniably significant, they do not cover the field. Rail traffic that is not exempted or subject to a Staggers

[27] The Act also substantially revised the standards governing rate bureau activities. 49 U.S.C. § 10706(a)(3) prohibits rate bureaus from permitting any rail carrier to discuss, agree on, or vote on single line rates and rates related to an interline movement in which that carrier does not participate. As a result, rate bureau activity among rail carriers is now substantially limited.

[28] Such contracts are filed with the ICC, which has limited disapproval authority. 49 U.S.C. § 10713(b)-(d). Contracts approved by the ICC and transportation under such contracts are not otherwise subject to the requirements of the ICA, *id.* § 10713(i)(1), including the requirement of adherence to rates in published tariffs. See *id.* § 10713(b) and 49 C.F.R. § 1312.41 (special tariff rules for contracts). A substantial volume of rail traffic now moves under such contracts.

[29] Pursuant to the exemption provision, 49 U.S.C. § 10505, the ICC has exempted several significant categories of rail service from regulation, including tariff filing requirements and rate regulation. *See, e.g.*, 49 C.F.R. § 1039.10 (certain agricultural commodities); § 1039.11 (frozen foods); § 1039.13 (trailer-on-flatcar and container-on-flatcar traffic); § 1039.14 (boxcar traffic), *affirmed in part, vacated in part, & remanded, Brae Corp.* v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3771 (U.S., April 29, 1985).

Act contract is still governed by tariffs that must be filed with the ICC and held open for public inspection, 49 U.S.C. § 10762. Rail carriers are required to adhere to the rates set forth in such published tariffs, *id.* § 10761(a), and to comply with the antidiscrimination provisions of § 10741.

Moreover, the ICC retains its longstanding rate reasonableness jurisdiction over tariff rates as to which it finds "market dominance." [30] Rail rates for market dominant traffic "must be reasonable," 49 U.S.C. § 10701a(b)(1), and the ICC may find such a rate "to be unreasonable if it exceeds a reasonable maximum" for the transportation in issue. *Id.* § 10709(c). A proceeding to determine whether a particular rail movement is market dominant and whether the applicable rate exceeds a reasonable maximum may be commenced either by the ICC on its own initiative or upon a complaint brought by a shipper. *Id.* §§ 10707(a), 11701(a), (b). If the ICC determines that the rate is unreasonable, it may order the rail carrier to stop charging that rate and prescribe the rate to be charged for the future, *id.* § 10704(a)(1), and, where appropriate, award damages, *id.* § 11705(b)(2). This same array of ICC powers and remedies is available with respect to tariff rates that are discriminatory under § 10741 or unreasonably low under § 10701a(b)(3). Thus, as to market-dominant traffic, the ICC continues to exercise, with some modification, the range of rate regulatory responsibilities and remedial powers that were vested in the ICC at the time of *Keogh*.

[30] "Market dominance" is "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10709(a). Market dominance exists where the ICC finds that the rate charged for the subject traffic exceeds a statutorily specified level, expressed in terms of a ratio of revenue to variable costs, *id.* § 10709(d)(2), and that there is an absence of effective competition for the subject traffic, *id.* §§ 10709(b) & -(d)(4). Rates for non-market-dominant traffic can be challenged as discriminatory under § 10741 or as unreasonably low under § 10701a(b)(3), but not as unreasonably high.

Since rail rate regulation now varies with the category of traffic, determining the continuing applicability of the *Keogh* doctrine to particular classes of rail traffic requires careful attention to the nature of the applicable regulatory regime. This motor carrier case, of course, is not the place for that analysis. Nevertheless, while the Staggers Act may have directly or, through later ICC exemption orders, indirectly limited the scope or application of the *Keogh* doctrine with respect to particular traffic, that Act is consistent with the continued vitality of the doctrine where carriers continue to be subject to the full rate regulatory and remedial regime of the ICA, including the requirement that carriers adhere to rates filed in published tariffs. Certainly in those areas, the policies underlying the *Keogh* doctrine continue to apply. Thus, the Act cannot be read as expressly or implicitly repudiating the *Keogh* doctrine. Still less can it be read, as the United States suggests, as supporting the conclusion that the *Keogh* doctrine had lost all validity before 1980.

VI. If *Keogh* Is To Be Overruled, This Court Should Make That Ruling Prospective Only.

If there is to be an overruling, it should be prospective only. While this Court does not always address retroactivity when it announces a new rule, it should determine the issue in this case to avoid the tremendous litigation costs that would accrue before the issue is settled. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982). Application of the three-factor analysis of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971), demonstrates the inappropriateness of a retroactive overruling. The absence of any single factor does not require that a new rule be retroactive, but in this case all three factors strongly favor prospectivity.

First, the Court would obviously be "overruling clear past precedent on which litigants may have relied," 404 U.S. at 106, if it adopts the arguments of the petitioners or the United States. Since 1922 railroads and other

carriers have looked to ICC policies and practices in setting the level of their rates, and aggrieved parties have looked to the ICC for remedies.

Second, to the extent that the availability of treble damages is intended to deter conduct that may be unlawful under the Sherman Act, retroactivity will not "further * * * its operation." 404 U.S. at 106-07. The conduct at issue is long past.

Third, the "inequity imposed by retroactive application," 404 U.S. at 107, is clear. Businesses shape their affairs, and regulate their conduct, on the basis of the accepted rule. Overruling *Keogh* retroactively would unfairly penalize railroads by subjecting them to substantial potential liabilities under standards not then applicable. On the other hand, shippers have always had available the remedies afforded by the ICA, and the Government had available criminal and civil injunctive remedies under the antitrust laws. Congressional repeal of *Keogh* surely would have been prospective only; if this Court reverses course after sixty-three years, the same rule should apply.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

Selected Provisions of the Interstate Commerce Act, as amended and supplemented through January 18, 1976, as published in 49 U.S. Code (1970 ed. & Supp. V 1975)*

Note preceding § 1.

NATIONAL TRANSPORTATION POLICY

Act Sept. 18, 1940, ch. 722, title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters, 1, 8, 12, 13 and 19 of this title, by inserting before part I thereof (chapter 1 of this title) the following provision entitled "National Transportation Policy:"

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title) so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of

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* The numbers of the sections of 49 U.S.C. that appear here are identical to the numbers of the Interstate Commerce Act sections, except that 49 U.S.C. § 5b was § 5a of the Act (added by Reed-Bulwinkle) and 49 U.S.C. § 41 was § 1 of the Elkins Act.

the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), shall be administered and enforced with a view to carrying out the above declaration of policy."

* * * *

§ 1. Regulation in general; car service; alteration of line.

(1) Carriers subject to regulation.

The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *

* * * *

From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes place within the United States.

(2) Transportation subject to regulation.

* * * *

(3) Definitions.

(a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter

shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

* * * *

(4) Duty to furnish transportation and establish through routes; division of joint rates.

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable

facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates,. fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) Just and reasonable charges.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

(5½) Exchange of services.

* * * *

(6) Classification of property for transportation; regulations and practices.

It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling,

transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

(7) Free transportation for passengers prohibited; exceptions; penalty.

* * * *

(8) Transportation of commodity manufactured or produced by railroad forbidden.

* * * *

(9) Switch connections and tracks.

Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line railroad, such shipper or owner of such lateral branch line of railroad, may make complaint to the Commission, as provided in section 13 of this title, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission

may make an order, as provided in section 15 of this title, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

(10) "Car service" defined.

The term "car service" in this chapter shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter.

(11) Duty to furnish car service; rules and regulations.

It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(12) Distribution of coal cars; failure to prorate; penalty.

It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

(13) Rules and regulations as to car service to be filed, etc.

The Commission is authorized by general or special orders to require all carriers by railroad subject to this chapter, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this chapter relating thereto.

(14) Establishment by Commission of rules, etc., as to car service.

(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, de-

termine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements of the Commission finds it to be in the national interest.

* * * *

(15) Powers of Commission in case of emergency.

Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the

public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

(16) Rerouting of traffic on failure of initial carrier to serve public.

(a) Whenever the Commission is of opinion that any carrier by railroad subject to this chapter is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15) of this section, make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagree-

ment, as the Commission may after subsequent hearing find to be just and reasonable.

* * * *

(17) Directions of Commission as to car service; disobedience; rights of States; bribery.

* * * *

(18) Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.

No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

(19) Application for certificate of Commission; notice and hearing.

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(20) Issuance of certificate by Commission; unlawful extension or abandonment of lines.

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(21) Power of Commission to require adequate facilities or extension of line; penalty.

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(22) Construction, etc., of spurs, switches, etc., within State.

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(Feb. 4, 1887, ch. 104, pt. I, § 1, 24 Stat. 379; June 29, 1906, ch. 3591, § 1, 34 Stat. 584; Apr. 13, 1908, ch. 143, 35 Stat. 60; June 18, 1910, ch. 309, § 7, 36 Stat. 544; May 29, 1917, ch. 23, 40 Stat. 101; Feb. 28, 1920, ch. 91, §§ 400-403, 41 Stat. 474-479; June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, §§ 2, 3(a), (b), 4, 54 Stat. 899-901; June 24, 1948, ch. 622, 62 Stat. 602; Aug. 2, 1949, ch. 379, § 1, 63 Stat. 485; June 27, 1952, ch. 477, title IV, § 402(g), 66 Stat. 277; Aug. 12, 1958, Pub. L. 85-625, § 3, 72 Stat. 570; May 26, 1966, Pub. L. 89-430, § 1, 80 Stat. 168; Jan. 2, 1974, Pub. L. 93-236, title VI, § 601(e), 87 Stat. 1021.)

§ 2. Special rates and rebates prohibited.

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty

of unjust discrimination, which is prohibited and declared to be unlawful. (Feb. 4, 1887, ch. 104, pt. I, § 2, 24 Stat. 379; Feb. 28, 1920, ch. 91, § 404, 41 Stat. 479; June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

§ 3. Preferences; interchange of traffic; terminal facilities.

(1) Undue preferences or prejudices prohibited.

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(1a) Export rates on farm commodities; Commission's power to carry out policy.

It is declared to be the policy of Congress that shippers of wheat, cotton, and all other farm commodities for export shall be granted export rates on the same principles as are applicable in the case of rates on industrial products for export. The Commission is directed, on its own initiative or an application by interested persons, to make such investigations and conduct such hearings, and, after appropriate proceedings, to issue such orders, as may be necessary to carry out such policy.

* * * *

(4) Interchange of traffic.

All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

(5) Terminal facilities; use of and compensation for.

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed

for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be. (Feb. 4, 1887, ch. 104, pt. I, § 3, 24 Stat. 380; Feb. 28, 1920, ch. 91, § 405, 41 Stat. 479; Mar. 4, 1927, ch. 510, § 1, 44 Stat. 1447; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Aug. 12, 1935, ch. 509, 49 Stat. 607; Sept. 18, 1940, ch. 722, title I, § 5(a), (c)-(f), 54 Stat. 902; Aug. 2, 1949, ch. 379, § 2(a), 63 Stat. 485.)

§ 4. Long and short haul charges; competition with water routes.

(1) Charges for long and short hauls and on through route; exemption.

It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the long distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission

may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice: *And provided further*, That the provisions of this paragraph shall not apply to express companies subject to the provisions of this chapter, except that the exemption herein accorded express companies shall not be construed to relieve them from the operation of any other provision contained in this Act.

(2) Competition of railroads with water routes; change of rates.

Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates

unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition. (Feb. 4, 1887, ch. 104, pt. I, § 4, 24 Stat. 380; June 18, 1910, ch. 309, §8, 36 Stat. 547; Feb. 28, 1920, ch. 91, § 406, 41 Stat. 480; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 6(a), 54 Stat. 904; July 11, 1957, Pub. L. 85-99, 71 Stat. 292; Sept. 27, 1962, Pub. L. 87-707, 76 Stat. 635.)

§ 5. Combinations and consolidations of carriers.

(1) Pooling; division of traffic, service, or earnings.

Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: * * *.

(2) Unifications, mergers, and acquisitions of control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraphs—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) * * * If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate

transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * *

(11) Plenary nature of authority under section.

The authority conferred by this section shall be exclusive and plenary * * *; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain and operate any properties and exercise any control or franchises acquired through such transaction. * * *

* * * *

(Feb. 4, 1887, ch. 104, pt. I, § 5, 24 Stat. 380; Aug. 24, 1912, ch. 390, § 11, 37 Stat. 566; Feb. 28, 1920, ch. 91, §§ 407, 408, 41 Stat. 480, 482; June 10, 1921, ch. 20, 42 Stat. 27; June 16, 1933, ch. 91, title II, §§ 201-203, 48 Stat. 217-220; June 19, 1934, ch. 652, § 221, 48 Stat. 1080; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 7, 54 Stat. 905; Aug. 2, 1949, ch. 379, §§ 3, 4, 63 Stat. 485; July 27, 1965, Pub. L. 89-93, § 1, 10 Stat. 284.)

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§ 5b. Agreements between carriers.

(1) Definition of "carrier" and "antitrust laws".

For purposes of this section—

(A) The term "carrier" means any common carrier subject to chapters 1, 8, or 12 of this title or any freight forwarder subject to chapter 13 of this title; and

(B) The term "antitrust laws" has the meaning assigned to such term in section 12 of Title 15.

(2) Application to Commission for approval of agreements; rules and regulations.

Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6) of this section) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) of this section should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

(3) Maintenance of accounts and records by conferences, bureaus, committees, etc.

Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section shall maintain such accounts, records, files,

and memoranda and shall submit to the Commission such reports, as may be prescribed by the Commission, and all such accounts, records, files, and memoranda shall be subject to inspection by the Commission or its duly authorized representatives.

(4) Agreements between carriers of different classes.

The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that such agreement is of the character described in paragraph (2) of this section and is limited to matters relating to transportation under joint rates or over through routes; and for purposes of this paragraph carriers by railroad, express companies, and sleeping-car companies are carriers of one class; pipeline companies are carriers of one class; carriers by motor vehicle are carriers of one class; carriers by water are carriers of one class; and freight forwarders are carriers of one class.

(5) Pooling or division agreements.

The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction, to which section 5 of this title is applicable.

(6) Agreements for determining matters through joint consideration.

The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure.

(7) Investigation of prior approved agreements; termination or modification of approval; effective date.

The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standard set forth in paragraph (2) of this section, or whether any such terms and conditions are not necessary for purposes of conformity with such standard, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

(8) Hearings.

No order shall be entered under this section except after interested parties have been afforded reasonable opportunity for hearing.

(9) Relief from operation of antitrust laws.

Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

(10) Effect of Commission's action.

Any action of the Commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or in prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of paragraph (9) of this section. (Feb. 4, 1887, ch. 104, pt. I, § 5a, as added June 17, 1948, ch. 491, 62 Stat. 472.)

§ 6. Schedules and statements of rates, etc., joint rail and water transportation.

(1) Schedule of rates, fares, and charges; filing and posting.

Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

(2) Schedule of rates through foreign country.

* * * *

(3) Change in rates, fares, etc.; notice required; simplification of schedules.

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is authorized to make

suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges, or classifications not changed if, in its judgment, not inconsistent with the public interest.

(4) Joint tariffs.

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

(5) Copies of traffic contracts to be filed.

Every common carrier subject to this chapter shall also file with said Commission copies of all contracts, agreements, or arrangements, with other common carriers in relation to any traffic affected by the provisions of this chapter to which it may be a party: *Provided, however,* That the Commission, by regulations, may provide for exceptions from the requirements of this paragraph in the case of any class or classes of contracts, agreements, or arrangements, the filing of which, in its opinion, is not necessary in the public interest.

(6) Form and manner of publishing, filing, and posting schedules; unlawful use.

The schedules required by this section to be filed shall be published, filed, and posted in such form and manner as the Commission by regulation shall prescribe; and the Commission is authorized to reject any schedule filed with

it which is not in accordance with this section and with such regulations. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(7) Transportation without filing and publishing rates forbidden; rebates; privileges.

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

(8) Preference to shipments for United States.

In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material or war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.

(9) Schedule lacking notice of effective date.

The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(10) Penalty for failure to comply with regulations.

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of $500 for each such offense, and $25 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

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(Feb. 4, 1887, ch. 104, pt. I, § 6, 24 Stat. 380; Mar. 2, 1889, ch. 382, § 1, 25 Stat. 855; June 29, 1906, ch. 3591, § 2, 34 Stat. 586; June 18, 1910, ch. 309, § 9, 36 Stat. 548; Aug. 24, 1912, ch. 390, § 11, 37 Stat. 568; Aug. 29, 1916, ch. 417, 39 Stat. 604; Feb. 28, 1920, ch. 91, §§ 409-413, 41 Stat. 483; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 8, 54 Stat. 910; Aug. 2, 1949, ch. 379, § 5, 63 Stat. 486.)

§ 7. Combinations to prevent continuous carriage of freight prohibited

It shall be unlawful for any common carrier subject to the provisions of this chapter to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the

place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this chapter. (Feb. 4, 1887, ch. 104, pt. I, § 7, 24 Stat. 382; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

§ 8. Liability in damages to persons injured by violation of law.

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. (Feb. 4, 1887, ch. 104, pt. I, § 8, 24 Stat. 382; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

§ 9. Remedies of persons damaged; election; witnesses.

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States

of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit. (Feb. 4, 1887, ch. 104, pt. I, § 9, 24 Stat. 382; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Oct. 15, 1970, Pub. L. 91-452, title II, § 243(a), 84 Stat. 931.)

§ 10. Violation of regulations by carrier; discrimination; penalties.

(1) Violation by carrier or officer; penalty.

Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of

the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

(2) False billing or classification by carrier; penalty.

Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

(3) Obtaining lower rates by false billing, etc., or by false claim; penalty.

* * * *

(4) Inducing unjust discrimination; penalty, liability for damages.

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(Feb. 4, 1887, ch. 104, pt. I, § 10, 24 Stat. 382; Mar. 2, 1889, ch. 382, § 2, 25 Stat. 857; June 18, 1910, ch. 309, § 10, 36 Stat. 549; Feb. 28, 1920, ch. 91, § 414, 41 Stat. 483; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

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§ 13. Complaints to and investigations by Commission.

(1) Complaint to Commission of violation of law by carrier; reparation; investigation.

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Complaints by State commissions; inquiry on Commission's own motion; expenses of State commissions.

Said Commissions shall, in like manner and with the same authority and powers, investigate any complaint

forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

* * * *

(Feb. 4, 1887, ch. 104, pt. I, § 13, 24 Stat. 383; June 18, 1910, ch. 309, § 11, 36 Stat. 550; Feb. 28, 1920, ch. 91, § 416, 41 Stat. 484; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 9(b, c), 54 Stat. 910; Aug. 12, 1958, Pub. L. 85-625, § 4, 72 Stat. 570.)

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§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(2) Orders of Commission.

Except as otherwise provided in this chapter, all orders of the Commission, other than orders for the payment

of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specific period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

(3) Establishment of through routes, joint classifications, joint rates, fares, etc.

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

(4) Through routes to embrace entire length of railroad; temporary through routes.

In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

(5) Transportation of livestock in carload lots; services included.

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(6) Commission to establish just divisions of joint rates, fares, or charges; adjustments.

Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circum-

stance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

(7) Commission to determine lawfulness of new rates; suspension; refunds.

Whenever there shall be filed with the Commisison any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by

reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(8) Shipper's choice of route to be observed.

In all cases where at the time of delivery of property to any railroad corporation being a common carrier for transportation subject to the provisions of this chapter to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this chapter provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefore as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said

line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however*, That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

(9) Liability of carriers where property is delivered contrary to routing instructions.

Whenever property is diverted or delivered by one carrier to another carrier contrary to routing instructions in the bill of lading, unless such diversion or delivery is in compliance with a lawful order, rule, or regulation of the Commission, such carriers shall, in a suit or action in any court of competent jurisdiction, be jointly and severally liable to the carrier thus deprived of its right to participate in the haul of the property, for the total amount of the rate or charge it would have received had it participated in the haul of the property. The carrier to which the property is thus diverted shall not be liable in such suit or action if it can show, the burden of proof being upon it, that before carrying the property it had no notice, by bill of lading, waybill or otherwise, of the routing instructions. In any judgment which may be rendered the plaintiff shall be allowed to recover against the defendant a reasonable attorney's fee to be taxed in the case.

(10) Direction of unrouted traffic by Commission.

With respect to traffic not routed by the shipper, the Commission may, whenever the public interest and a fair distribution of the traffic require, direct the route which such traffic shall take after it arrives at the terminus of one carrier or at a junction point with another carrier, and is to be there delivered to another carrier.

(11) Disclosure or solicitation of information concerning shipments unlawful; exceptions.

It shall be unlawful for any common carrier subject to the provisions of this chapter, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportaion, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: *Provided*, That nothing in this chapter shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any State or Federal court, or to any officer or agent of the Government of the United States, or of any State or Territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

(12) Penalty for violation of preceding provisions.

Any person, corporation, or association violating any of the provisions of paragraph 11 of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than $1,000.

(13) Allowance for services or facilities furnished by shipper.

If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or funishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this chapter and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

(14) Other powers of Commission not excluded.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this chapter. (Feb. 4, 1887, ch. 104, pt. I, § 15, 24 Stat. 384; June 29, 1906, ch. 3591, § 4, 34 Stat. 589; June 18, 1910, ch. 309, § 12, 36 Stat. 551; Feb. 28, 1920, ch. 91, §§ 418-421, 41 Stat. 484-488; Mar. 4, 1927, ch. 510, § 2, 44 Stat. 1447; June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 10(a-d), 54 Stat. 911, 912.)

§ 15a. Fair return for carriers.

(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the

movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act. (Feb. 4, 1887, ch. 104, pt. I, § 15a, as added Feb. 28, 1920, ch. 91, § 422, 41 Stat. 488, and amended June 16, 1933, ch. 91, title II, § 205, 48 Stat. 220; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 10(e), 54 Stat. 912; Aug. 12, 1958, Pub. L. 85-625, § 6, 72 Stat. 572.)

* * * *

§ 16. Orders of Commission and enforcement thereof.

(1) Award of damages.

If, after hearing on a complaint made as provided in section 13 of this title, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

(2) Proceedings in courts to enforce orders; costs; attorney's fee.

* * * *

(3) Limitation of actions.

(a) All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

(b) All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this chapter within three years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the two-year period of limitation in subdivision (b) of this paragraph or of the three-year period of limitation in subdivision (c) of this paragraph a carrier subject to this chapter begins action under subdivision (a) of this paragraph for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

(f) A complaint for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

(g) The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.

(h) The provisions of this paragraph shall extend to and embrace cases in which the cause of action accrued prior to June 7, 1924, as well as cases in which the cause of action accrues thereafter, except that actions at law begun or complaints filed with the Commission against carriers subject to this chapter for the recovery of overcharges where the cause of action accrued on or after March 1, 1920, shall not be deemed to be barred under subdivision (c) of this paragraph if such actions shall have been begun or complaints filed prior to June 7, 1924, or within six months thereafter.

(i) The provisions of this paragraph (3) shall extend to and embrace all transportation of property or passengers for or on behalf of the United States in connection with any action brought before the Commission or any court by or against carriers subject to this chapter: *Provided, however*, That with respect to such transportation of property or passengers for or on behalf of the United States, the periods of limitation herein provided shall be extended to include three years from the date of (A) payment of charges for the transportation involved, or (B) subsequent refund for overpayment of such charges, or (C) deduction made under section 66 of this title, whichever is later.

(4) Joinder of parties; process; judgment.

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(5) Service of order of Commission and notices of proceedings.

* * * *

(6) Suspension or modification of orders.

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

(7) Compliance with orders.

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

(8) Failure of carrier or officer to obey orders; penalty.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this title shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

(9) Suit for recovery of forfeiture.

The forfeiture provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

(10) United States attorneys to prosecute for forfeitures; costs and expenses.

* * * *

(11) Employment of attorneys by Commission.

* * * *

(12) Proceedings to enforce orders other than for payment of money.

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(13) Copies of schedules, tariffs, contracts, etc., kept as public records; evidence.

The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of this chapter shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in

evidence with like effect as the originals. (Feb. 4, 1887, ch. 104, pt. I, § 16, 24 Stat. 384; Mar. 2, 1889, ch. 382, § 5, 25 Stat. 859; June 29, 1906, ch. 3591, § 5, 34 Stat. 590; June 18, 1910, ch. 309, § 13, 36 Stat. 554; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Oct. 22, 1913, ch. 32, 38 Stat. 219; Feb. 28, 1920, ch. 91, §§ 423-429, 41 Stat. 491, 492; June 7, 1924, ch. 325, 43 Stat. 633; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 11(a), (b), 54 Stat. 912, 913; June 25, 1948, ch. 646, § 1, 62 Stat. 909; Aug. 2, 1949, ch. 379, § 6, 63 Stat. 486; Aug. 26, 1958, Pub. L. 85-762, § 1(1), (2), 72 Stat. 859.)

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§ 41. Liability of corporation carriers and agents; offenses and penalties.

(1) Liability of corporation common carriers; offenses; penalties; jurisdiction.

* * * The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; * * *.

(2) Liabilities for acts of agents; departure from published rates.

* * * Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under sections 41, 42, or 43 of this title, shall be conclusively

deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section.

(3) Receiving rebates; additional penalty and recovery thereof.

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(Feb. 19, 1903, ch. 708, § 1, 32 Stat. 847; June 29, 1906, ch. 3591, § 2, 34 Stat. 587.)